Dockets.Justia.com

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

GEORGE DZIAMNISKI,	)	
	)	
Plaintiff,	)	
	)	Civil Action No. 07-604
v.	)	
	)	The Honorable David Cercone
KIRKPATRICK & LOCKHART,	)	
	)	
Defendant.	)	

RESPONSE IN OPPOSITION TO MOTION FOR DEFAULT JUDGMENT

Kirkpatrick & Lockhart Preston Gates Ellis LLP ("K & L Gates"), incorrectly named in the caption, responds to Plaintiff George Dziamniski's ("Plaintiff") Motion for Default Judgment as follows:

1. Plaintiff filed a Complaint against K & L Gates on or about May 8, 2007, as reflected in the record.

2. On June 1, 2007, K & L Gates received, by Certified Mail, a copy of the Complaint and a request that service be waived. K & L Gates did not return an executed Waiver of Service of Summons. Because the non-return of the Waiver of Service was inadvertent and K&L Gates does not wish to put the Plaintiff to the trouble or expense of service or to further delay this lawsuit, K & L Gates is willing to waive service of the Complaint and Summons in this matter, or its undersigned counsel will accept service by mail.

3. On June 22, 2007, the undersigned counsel entered their appearances on behalf of K & L Gates in this action.

4. K & L Gates admits that it received correspondence from Plaintiff regarding this case on July 3, 2007, when it received the Summons and a copy of the Complaint by mail.

5. However, pursuant to the Federal Rule of Civil Procedure 4, service is not effective by sending a summons via Certified Mail. Instead, Rule 4 provides that a defendant must be served by either (1) by delivering a copy of the summons and the complaint to an officer, managing or general agent, or to any other agent authorized to receive service; (2) by delivering a copy of the summons and the complaint to an agent authorized to receive service; or (3) in any manner provided for by state law. Sending a summons to an in-state defendant by Certified Mail is not an effective means of service, and therefore, K & L Gates has not been properly served as of this date.

6. Plaintiff has not properly served a copy of the summons and complaint on K & L Gates, nor its attorneys of record, and therefore, the time for K & L Gates to respond has not lapsed. Without waiving the right to object based on improper service, K & L Gates is filing, concurrently with this response, an Answer to Plaintiff's Complaint.

7. Entry of a default judgment cannot occur until there is proper service on the defendant and the time for response has expired without an appropriate response by the defendant.

WHEREFORE, Defendant Kirkpatrick & Lockhart Preston Gates Ellis LLP respectfully requests that this Court deny Plaintiff's Motion for Default Judgment in its entirety.

Respectfully submitted,

s/ James W. Carroll, Jr.

James W. Carroll, Jr., Esquire
Pa. I.D. No. 21830
Cami L. Davis, Esquire
Pa. I.D. No. 91223
Rothman Gordon, P.C.
310 Grant Street
Third Floor, Grant Building
Pittsburgh, PA 15219
(412) 338-1110

CERTIFICATE OF SERVICE

I, James W. Carroll, Jr., certify a true and correct copy of the foregoing Response in Opposition to Motion for Default Judgment was served upon the following persons via first class, postage prepaid mail, this 3rd day of August, 2007:

George Dziamniski
4177 Finley-Elrama Road
Finleyville, PA 15332

s/ James W. Carroll, Jr.
James W. Carroll, Jr.